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Supreme Court, U.S.
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No. 00-1020

IN THE

Supreme Court of the United States

NICHOLAS J. BOROFF,

Petitioner,

v.

VAN WERT CITY BOARD OF EDUCATION, JOHN BASHINGER, WILLIAM CLIFTON, and DAVID FROELICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT M. MORROW
MEANS, BICHIMER, BURKHOLDER & BAKER
2006 Kenny Road
Columbus, OH 43221-3502
(614) 485-2010

PAUL R. BONFIGLIO
Counsel of Record
420 Madison Avenue
Suite 650
Toledo, OH 43604
(419) 242-7488

Attorneys for Respondents

165180

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals properly determined that Respondents' decision to prohibit Petitioner from wearing Marilyn Mansion t-shirts during school pursuant to its dress code was not manifestly unreasonable.

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STATEMENT OF FACTS

Petitioner Nicholas Boroff ("Boroff") has contended that Respondents' enforcement of its dress and grooming policy to prohibit Marilyn Manson t-shirts on school grounds and during the school day violates his First Amendment rights. As a result, Boroff sued Van Wert City School District Superintendent John Basinger, Van Wert High School Principal William Clifton, Administrative Assistant David Froelich, as well as the Van Wert City Board of Education.

The Van Wert High School dress code provides, in relevant part, that "clothing with offensive illustrations . . . [is] not acceptable . . . School officials reserve the right to make recommendations for changes in the dress and grooming of students." (R.9, Joint Appendix ("App.") at pages 66, 78).

Marilyn Manson is, to say the least, an atypical rock band. Its members have taken their names from celebrities and serial killers. (R.9, App. page 120). Marilyn Manson the person is a member of the Church of Satan and an unabashed drug abuser. (R.9, App. page 120). The band performs what has been termed "death rock" and its concerts have been flash points for controversy. (R.9, App. page 120). The band's lyrics describe, among other things, Satanism, suicide, torture, and violent death and are replete with racial epithets and obscenities. (R.9, App. pages 99-119).

On August 29, 1997 Boroff wore a Marilyn Manson t-shirt to school. (R.4, App. page 40). The t-shirt had the name "Marilyn Manson" on it with a picture of a three-faced Jesus Christ, and beneath that picture the words "See no truth, hear no truth, speak no truth." (R.4, App. page 40). The word

"BELIEVE" was printed on the back of the shirt with the word 'LIE' printed in different colors from the rest of the word. (R.4, App. page 40).

David Froelich, Administrative Assistant in charge of student discipline, told Boroff that the t-shirt violated the Van Wert High School dress and grooming policy and suggested that he either remove it, turn the shirt inside out, or go home and change his clothes and return to school. (R.9, App. pages 136-137). Boroff left school and did not return that day.

On September 4, 5, 8, and 9, 1997 Boroff attempted to wear different Marilyn Manson t-shirts to school and was met with similar responses from school officials. (R.9, App. Pages 68, 69; and pages 136, 137). On September 4 Mr. Froelich, Mr. Clifton, and Superintendent Basinger each met with Boroff and his mother and explained why the Marilyn Manson t-shirts were offensive and why the shirts violated the school's dress code. (R.9, App. Pages 68,137-138; 127-128).

Boroff did not attend school on September 10, 11, 12, and 15, 1997. (R.9, App. pages 69-70). On September 16, 1997 Boroff's mother on his behalf filed a Complaint, Request for Temporary Restraining Order and Motion for Preliminary Injunction in the District Court claiming, among other things, that the school's prohibition respecting Marilyn Manson t-shirts on school grounds during the school day violated his First Amendment rights. The District Court denied the Motion for Temporary Restraining Order and Preliminary Injunctive Relief. Thereafter, the District Court granted the school's Motion for Summary Judgment, ruling that the school's determination that the Marilyn Manson

t-shirts were offensive and violated the school's dress code was not manifestly unreasonable. Boroff appealed the decision of the District Court and the Sixth Circuit affirmed, holding again that the Respondents appropriately determined that the shirts were offensive and that the Respondents decision to ban those t-shirts was not manifestly unreasonable.

REASONS FOR DENYING THE WRIT

The decisions of the District Court and the Sixth Circuit Court of Appeals are entirely consistent with previous decisions of this Court which have analyzed and construed the First Amendment rights of students in public schools.

Contrary to the allegation raised in Boroff's brief, both the Sixth Circuit Court of Appeals and the District Court applied the appropriate legal standard in determining that Respondents properly prohibited Boroff from wearing Marilyn Manson t-shirts to school. As explained by both the Sixth Circuit and the District Court, three decisions from this court strike an appropriate balance between a student's limited first amendment rights and the need for public schools to foster an educational environment free from undue disruptions to the learning process. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The lower courts clearly applied the appropriate legal analysis which this Court has established in the *Tinker-Fraser-Kuhlmeier* trilogy in deciding the underlying action. *Tinker* addressed non-disruptive speech not sponsored

by the school that was banned solely on the basis of its content. The issue in *Tinker* was whether Plaintiff could wear black armbands at school protesting the Vietnam War. This Court determined that a student's right to expression on school grounds was protected by the first amendment but only where those opinions were expressed, ". . . without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Tinker*, 393 U.S. at 513.

Fraser involved a student's speech containing explicit sexual metaphors given at a school sponsored assembly. Unlike the armband at issue in *Tinker*, which did not interfere with the rights of other students or the work of the school, the Court determined the speech in *Fraser* was both offensive and sponsored by the school. As such, the school could appropriately take steps to ensure the school's basic educational mission. This Court in *Fraser* ruled schools could properly sanction the student for using offensive language because, "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against societies' countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser* at 478 U.S. 680, 681. Recognizing the dynamics of a high school setting and the sensibilities of fellow students, this Court elaborated:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the

> appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Id. at 682-83.

Finally, the Supreme Court in *Kuhlmeier* determined that a school district did not violate the First Amendment rights of student newspaper editors when it deleted portions of articles from the high school newspaper. Again recognizing the unique characteristics of a public school's environment, the court determined, "A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." *Kuhlmeier*, 484 U.S. at 266.

As a result, and as explained by both the District Court and the majority opinion of the Sixth Circuit below, these cases detail three principal rules balancing a student's limited first amendment rights with a public school's need to foster education in an environment free from undue disruptions to the learning process. First, speech that is neither vulgar, offensive, nor school sponsored can be prohibited under *Tinker* only if it causes substantial and material disruptions to the school's operation. Second, vulgar or offensive speech under *Fraser* can be prohibited without a showing of material disruption to the school's operation since the constitutional rights of students in public schools are not coextensive with

rights of adults in other settings. Third, school sponsored speech under *Kuhlmeier* can be restricted where a limitation is reasonably related to a school's legitimate educational mission even though censorship would be inappropriate outside of the public school setting.

Neither the United States District Court nor the Sixth Circuit Court of Appeals departed from the standards and analysis set forth in *Tinker*, *Fraser* and *Kuhlmeier* in determining that Respondents' decision banning the t-shirts was not manifestly unreasonable. Both Courts analyzed those decisions and their progeny, reviewed the evidence submitted by the parties, properly determined that *Fraser* applied, and ruled that the Respondents could find the shirts offensive and patently contrary to the school's educational mission. In conjunction with that finding, and again applying *Fraser* and its progeny, both Courts then properly determined that Respondents could prohibit Petitioner from wearing those t-shirts on school grounds during the school day.

Furthermore, this case does not present an otherwise compelling federal question. This case does not involve political speech or any other particular type of viewpoint; in fact, Petitioner never identified what if any message he intended to convey by wearing the shirts. Instead, this case simply concerns a student's attempt to wear Marilyn Manson t-shirts to school despite being repeatedly told by school officials that those shirts violate the school's dress and grooming policy.

A. The Sixth Circuit Properly Concluded That Respondents Did Not Act In A Manifestly Unreasonable Manner By Prohibiting Marilyn Manson's T-Shirts Pursuant To Its Dress Code.

As previously demonstrated, both the District Court and The Sixth Circuit Court of Appeals carefully analyzed this Court's three principal cases and determined that *Fraser* and its progeny applied. Both courts concluded that Respondents pursuant to that authority could prohibit a student such as Boroff from wearing t-shirts that are offensive but not obscene without a finding of substantial disruption. This determination is consistent with well-established precedent which allows school officials to determine what manner of speech in the classroom or in school is inappropriate so long as that decision is not manifestly unreasonable. *See Fraser*, *supra*; *see also Chandler v. McMinnville School District*, 978 F.2d 524, 529 (9th Cir. 1992).

The Sixth Circuit determined the t-shirts were offensive under *Fraser* and that the school did not act in a manifestly unreasonable manner in prohibiting those t-shirts under its dress code. The evidence below supports those conclusions. Respondents submitted nine separate affidavits, many with supporting exhibits, to support the school's determination that the shirts, as well as the persona associated with the band, were offensive and violated the school's educational goals and its educational mission. (R.9, App. pages 43-167). The first Marilyn Manson t-shirt Petitioner wore to school depicted a distorted three-headed Jesus which, according to the high school principal, was offensive because, "Mocking any religious figure is contrary to our educational mission which is to be respectful of others and others beliefs." (R.9, App. pages 70-71). Principal Clifton further believed

that the shirt was offensive because it could reasonably be seen to promote dishonesty in an educational environment dedicated to promoting just the opposite. *Id.*

The other Marilyn Manson t-shirts Petitioner wore to school on subsequent days were treated in the same fashion and with the same disapproval. Van Wert School officials and teachers attested that those shirts were offensive and contrary to the school's educational mission because others could see the shirts and associate those shirts with the band's overt ties to suicide, "death rock", violence, and drug abuse. (R.9, App. pages 71-76). Respondents' evidence showed that the band's lyrics contained numerous racial epithets, patently obscene and offensive language, and exhortations to suicide and violence that countervene the school's educational mission of instilling the ideals of democracy, establishing core values of honesty and respect for the human condition, and establishing a sense of civic responsibility. (R.9, App. pages 70-71; 81-82).

That evidence also shows that Marilyn Manson himself admits he abuses drugs, and the band's pro-drug comments, together with its unrelenting associations through its lyrics and reputation with violence, serial killers, suicide and "death rock", can reasonably be seen by school officials as being contrary to the school's anti-drug policies and contrary to the overall educational mission of the school. (R.9, App. pages 71; 128; and 139). Finally, the unrebutted testimony of Principal Clifton conveyed his opinion, based on his fourteen years of experience, that children are genuinely influenced by rock groups and such propaganda.

The Sixth Circuit determined that Respondents could properly find the shirts were offensive and that those shirts,

as well as the band the shirts promoted, endorsed values that were patently contrary to the school's educational mission. Federal courts have consistently recognized that a school's interpretation of its dress code is part and parcel of the day to day operation of the school and afford public schools broad discretion in determining what does or does not constitute an offensive t-shirt in this context. *See, e.g., Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994). Indeed this Court has explained that "the responsibility for educating our youth rests primarily with parents, teachers, and state and local school officials — and not the federal judiciary." *See Kuhlmeier*, 484 U.S. at 273. Given the evidence below, and given the authority of *Fraser* and its progeny, the Sixth Circuit properly upheld the Respondents' authority to ban Marilyn Manson t-shirts under these circumstances.

B. The Evidence In The Record Does Not Support Petitioner's Claim That Respondents Engaged In Illegal Viewpoint Discrimination.

The Sixth Circuit properly explained that the evidence submitted below cannot support Petitioner's claim that the school's decision resulted in viewpoint discrimination.[1] Echoing the dissenting opinion below, Boroff argues that the school engaged in viewpoint discrimination. As correctly noted by the majority below, however, that argument focuses on a single sentence in Principal Clifton's affidavit. As noted further by the majority, the school's prohibition did not result from nor target a single Marilyn Manson t-shirt but resulted instead from Marilyn Manson and his band's promotion of,

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1. In fact the record below fails to demonstrate what, if any, message Boroff had in mind by wearing those shirts.

"Disruptive and demoralizing values which are inconsistent with and counterproductive to education." Indeed, Principal Clifton's affidavit, coupled with the affidavits of eight other school teachers and administrators, underscore that the school's determination that all the Marilyn Manson t-shirts and the band's persona were offensive and contrary to the mission of the school. That evidence illustrates that Marilyn Manson the person and Marilyn Manson the band promote drug abuse and maintain overt associations with violence, death rock, and suicide. Indeed, the band's lyrics exhort similar themes as well as torture, racial epithets, and obscenities. For example, the band's song, "Your Irresponsible Hate Anthem" includes the following:

> Hey victim, should I blacken your eyes again . . .
> let's just kill everyone and let your God sort them
> out/fuck it/everybody's someone else's nigger . . .
> I wasn't born with enough middle fingers . . .

(R:9, App. page 103).

The song, "Beautiful People" contains the following lyrics:

> Don't bother to resist, I'll beat you . . . you can't
> smell/your own shit on your knees . . . there's no
> time to discriminate/hate every mother fucker/
> that's in your way . . .

(R:9, App. page 104).

And citing just one more example, the song, "Reflecting God" contains the following exhortations:

> When I am God everyone dies . . . one shot and the world gets smaller . . . each thing I show you is a piece of my death/shoot shoot shoot mother fucker/no salvation no forgiveness . . .

(R:9, App. page 117).

This evidence adduced in the Courts below demonstrates that the school's determination that the Marilyn Manson t-shirts were contrary to the school's educational mission was not manifestly unreasonable. The school's prohibition respecting those shirts was applied uniformly to each of the Marilyn Manson t-shirts Boroff wore to school that year. All were banned in the same manner and for the same reasons: they were determined to be vulgar, offensive, and contrary to the mission of the school.

C. In The Alternative, Respondents' Prohibition Was Also Appropriate Because Those Shirts Could And Did Cause Substantial Disruption In The School.

Petitioner's additional argument that the t-shirts can't be banned without a showing they would cause material disruption is inapplicable given that the evidence below established the shirts were offensive and vulgar under *Fraser*. In fact, no reviewing Court has reached that issue.

Even if this Court would consider that issue, the affidavits of school officials detailed disruptive incidents in the classroom stemming from Petitioner's association with Marilyn Manson. (R.9, App. pages 74-76;167-168; 155-156, and 165-166). Moreover, those affidavits disclose that school officials reasonably feared the same type of controversy and disruption that ensued the preceding summer at a nearby

Marilyn Manson concert could spill into the learning environment at the school or otherwise interfere with the learning process.

CONCLUSION

Respondents' evidence showed that the Marilyn Manson t-shirts were offensive and violated basic tenants of the school's educational mission and its dress code. The Sixth Circuit reviewed that evidence, applied the reasoning and standards set forth in this Court's decisions in *Fraser*, *Tinker* and *Kuhlmeier*, and properly determined the school's proscription against Marilyn Manson t-shirts being worn during the school day was not manifestly unreasonable. The law is well established in this area and was properly applied by the Courts below. Respondents therefore request that the Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT M. MORROW
MEANS, BICHIMER,
BURKHOLDER & BAKER
2006 Kenny Road
Columbus, OH 43221-3502
(614) 485-2010

PAUL R. BONFIGLIO
Counsel of Record
420 Madison Avenue
Suite 650
Toledo, OH 43604
(419) 242-7488

Attorneys for Respondents